OneWest Bank, N.A. v FMCDH Realty
2015 NY Slip Op 32853(U)
November 9, 2015
Supreme Court, Nassau County
Docket Number: 14-008050
Judge: Daniel R. Palmieri

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

----------X TRIAL/IAS PART 20

OneWest Bank, N.A. f/k/a OneWest Bank, FSB,

Plaintiff,

- *against* -

FMCDH Realty, Neubauer Electric LLC, New York City Dept. of Finance, New York State Department of Taxation and Finance, Michael R. Franzese, Columbia Credit Services Inc. (AAO) MBNA America Bank NA, LVNV Funding LLC (APO) Sears, New York Commission of Tax and Finance, Worldwide Asset Purchasing II LLC, North Star Capital Acquisitions LLC, Capital One Bank, Internal Revenue Service-United States of America, New York State Department of Taxation and Finance Tax Compliance Division-C.O-ATC,

"JOHN DOE", "RICHARD ROE", "JANE DOE", "CORA COE:, "DICK MOE" and "RUBY POE", the six defendants last named in quotation marks being intended to designate tenants or occupants in possession of the herein described premises or portions thereof, if any there be, said names being fictitious, their true name being unknown to plaintiff,

Defendants.

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Index No. 14-008050

Mot. Seq. #001
Mot. Seq. #002
Mot. Date: 7-10-15
Submit Date: 10-19-15

The following papers were read on this motion:

Notice of Motion, dated 5-18-15.....1
Affirmation of Attorney, dated 5-18-15.....2
Plaintiff's Memorandum of Law, dated 5-18-15.....3
Notice of Cross Motion, dated 7-2-15.....4
Affirmation in Opposition/Reply, dated 9-4-15.....5
Reply Memorandum of Law, dated 10-19-15.....6

This motion by the plaintiff OneWest Bank N.A. (Bank) pursuant to CPLR 3212 for summary judgment on its complaint to foreclose on a reverse mortgage is granted. The cross

motion to transfer this matter to Justice Feinman, or, in effect, in the alternative, pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied in its entirety.

The Bank alleges that it is the assignee and holder of a certain mortgage dated September 9, 2005, given by borrower Maxine Minicozzi in a maximum principal amount of $1,612,304.00, and duly recorded on February 6, 2006. The mortgage on her home in Locust Valley, New York secured the debt and the borrower also executed a loan account agreement on September 9, 2005, in which the borrower was to receive funds from the mortgagee at certain intervals. Plaintiff alleges that it is the assignee and holder of this agreement and its promise to pay as well. Under the terms of the agreement these sums were to be repaid with interest as agreed upon the borrower's death, or at the time she no longer used the home as her principal residence. The borrower died on May 31, 2010, and thus by its terms the amounts she had borrowed, $995,030.13, became due and payable at that time.

Title to the property was conveyed by the executors of her estate to NMNT Realty Corp., in 2011, and further conveyed to defendant FMCDH Realty Inc. (FMCDH, or defendant) in March, 2014. The plaintiff alleges that the mortgage and note were assigned to it in March 2014 and this foreclosure action was begun in August, 2014. As plaintiff alleges that the assignment predates the action – and that it had physical possession of the original reverse mortgage instruments since May of 2011 (apparently because it was the loan servicer) – it asserts standing to bring this case.

All defendants were duly served. FMCDH interposed an answer, and alone opposes the plaintiff's motion. The Court finds that by presentation of the documents by an Assistant Secretary of plaintiff evidencing its standing, including a statement of physical possession of

the agreement/note and the mortgage by plaintiff prior to commencement of the action, together with a statement of the failure to pay as required, and the insufficiency of the affirmative defenses raised in the answer, the plaintiff has made out its *prima facie* case for judgment as a matter of law. *See, e.g., Deutsche Bank Natl. Trust Co. v Islar,* 122 AD3d 566 (2d Dept. 2014); *GRP Loan, LLC v Taylor,* 95 AD3d 1172 (2d Dept. 2012). The burden thus shifts to FMCDH to demonstrate the existence of an issue of fact meriting a trial. CPLR 3212 (b); *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

On its cross motion and in opposition to the motion, FMCDH raises the issue of plaintiff's standing, and, relatedly, the propriety of having the undersigned decide this motion.

Initially, the Court cannot agree with defendant that this matter should be transferred to Justice Feinman, who dismissed a prior action brought by plaintiff's predecessor in interest against FMCDH's predecessor in interest. Although the substance of the actions is the same, and the issue of standing was also raised, that matter involved different parties and has been concluded. Under these circumstances, this Court can find no basis for not discharging its own responsibility to rule on a matter to which is has been randomly assigned. Upon a review of the papers submitted, it is no less prepared than Justice Feinman to rule, and need only consider the effect of his prior determination, discussed below.

In that regard, the Court rejects defendant's contention that the plaintiff here is bound by Justice Feinman's findings as a matter of collateral estoppel, as plaintiff was not a party to the prior action, did not have a full and fair opportunity to contest the key finding made therein,

and the particular issue decided by Justice Feinman, though related, is not decisive of a key argument raised here by the plaintiff. *See generally Ryan v New York Tel. Co.,* 62 NY2d 494 (1984); *Gilberg v Barbieri,* 53 NY2d 285, 291 (1981). The Court thus concludes that the plaintiff is not bound by the prior order, even though, as defendant contends, a successor in property rights may be deemed in appropriate circumstances to be in privity with its predecessor for purposes of the doctrine. *Buechel v Bain,* 97 NY2d 295, 304 (2001). In this case the Court is mindful that doubts regarding the tests for an estoppel as articulated in these cases should be resolved against preclusion, given the severe consequences that may befall a party who was not a party to the prior action and thus did not have a fair opportunity to litigate the issue. *Id.*

Specifically, Justice Feinman found that an affidavit attesting to a purported assignment out of the lender was insufficient to demonstrate standing because it was not accompanied by a power of attorney granting the signatory assignor the power to do so. While this was found fatal to the standing of plaintiffs' predecessor, he did not rule or cast doubt on the original instruments themselves. Rather, he noted a defect with regard to the written assignment of the note and mortgage, and that there was insufficient proof of when physical possession was obtained by the plaintiff, as such possession was required before the action was commenced.

Here, however, the plaintiff has presented the signed loan agreement, counsel for the plaintiff asserts on personal knowledge that he received it from the plaintiff prior to commencement of the action, and that it bears an indorsement in blank by the original lender Financial Freedom Senior Funding Corporation on the back of the signature page that had been

executed by the borrower. [1]

Counsel states in his replying affirmation that "As I have the original note in front of me as I write this affirmation, I can hereby confirm that this indorsement is on the back of page "13" of the note." He offers *in camera* review, but the Court accepts his affirmed statement as an officer of the court. This is proof that the indorsement in blank is part of the original instrument (UCC 3-202([2]), and had transformed that agreement, containing the borrower's promise to pay (section 2.1 of the agreement) into a bearer instrument, which may be negotiated by delivery to a third party. UCC 3-204(2); *see Franzese v Fidelity New York, FSB,* 214 AD2d 646 (2d Dept. 1995). Accordingly, if plaintiff had possession of the agreement/note at the time the foreclosure action was commenced, it had the standing to bring that action, as the mortgage passed as an incident to the note. *Mortgage Electronic Registration Sys., Inc. v Coakley,* 41 AD3d 674 (2d Dept. 2007) [indorsement in blank on note, ultimate possession by plaintiff provides standing]; *see also GRP Loan, LLC v Taylor, supra,* at 1173.

Because of its original status as a bearer instrument, the history of written assignments of the note (and mortgage, as an incident to the note) before plaintiff obtained physical possession, even if those assignments were questionable, as defendant contends, does not undermine plaintiff's standing. The instrument contains no further indorsement on its face, and there are no allegations of any wrongful act or challenge by a prior holder as to how plaintiff came into possession. Further, counsel for plaintiff of his own knowledge states that he had physical possession of the original note and mortgage from the plaintiff before this action was

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[1] In its entirety, the endorsement reads, "PAY TO THE ORDER OF: [blank] WITHOUT RECOURSE BY FINANCIAL FREEDOM SENIOR FUNDING CORPORATION A DELAWARE CORPORATION [signature] JUDITH CLEMENTS, VICE PRESIDENT"

commenced, which is sufficient. *Central Mortg. Co. v* McClelland, 119 AD3d 885 (2d Dept. 2014); *Aurora Loan Svs. Inc. v Taylor,* 114 AD3d 627 (2d Dept. 2014); *cf., Wells Fargo Bank v Burke,* 125 AD3d 765 (2d Dept. 2015).

In short, any defects or questions arising from prior written assignments, including any that would impugn the validity of an assignment to the present plaintiff, do not undermine standing flowing from physical possession by the plaintiff of the bearer instrument prior to commencement of the action. Further, and unlike Justice Feinman's finding, this Court now has proof based on personal knowledge of counsel that plaintiff had such timely physical possession of the agreement/note.

Finally, the Court rejects defendant's resort, in effect, to CPLR 3212(f), in which it asserts that it should be permitted to conduct discovery and that the motion should be denied for that reason. However, defendant has not shown that discovery may lead to evidence that plaintiff was not in possession of the note and mortgage at the time the action was commenced, nor has it shown that such discovery may lead to evidence that there is some basis, other than lack of standing, for denying plaintiff summary judgment at this time. *See generally Golden Stone Trading Inc. v Wayne Electro Sys., Inc.,* 45 AD3d 638 (2d Dept. 2007).

Accordingly, the motion is granted and the cross motion is denied.

Submit order of reference on notice.

This shall constitute the Decision and Order of this Court.

Dated: November 9, 2015

ENTERED

NOV 10 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

HON. DANIEL PALMIERI
J.S.C.

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